BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
STAPLES, INC. and QUICK LINK INFORMATION SERVICES, LLC,	)	
Petitioners	)	
v.	)	
MATTISON R. VERDERY, C.P.A., P.C.,	)	**CG Docket No. 02-278**
Respondent.	)	
Brief of Respondent in Opposition to Petition for Expedited Declaratory Ruling and for a Cease and Desist Order	)	

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR EXPEDITED DECLARATORY RULING AND FOR A CEASE AND DESIST ORDER

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Pursuant to Commission Rule 1.45(d),[1] the Respondent files this brief in opposition to the petition for expedited declaratory ruling and cease and desist order ("Petition") filed by Staples, Inc. ("Staples") and Quick Link Information Services, LLC ("Quick Link") (collectively, the "Petitioners").

The Petition is an unwarranted and unlawful attempt to divest a state court of exclusive jurisdiction granted by Congress over private actions brought under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1) ("TCPA"). The Petitioners seek not only to have the Commission decide issues of law properly pending before a state court in a civil suit involving these same parties, but something extraordinary and unprecedented–Petitioners ask a federal agency to invade a court's legal province and undisputed jurisdiction and order a private litigant to cease prosecution of rights and remedies specifically authorized by federal statute.

The Commission should not, and indeed is without authority, to grant the Petitioners any relief they seek.

I. FACTUAL BACKGROUND

On March 18, 2003, the Respondent, a small accounting firm located in Augusta, Georgia, received an unsolicited facsimile (the "Fax") advertising Staples' products.[2] The Fax was transmitted by Petitioner Quick Link on behalf of Staples.[3] Id. At no time did the

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[1] **47 C.F.R. § 1.45(d).**

[2] **Plaintiff's Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages ("Amended Complaint"), Petition, Ex. 4, ¶ 16.**

[3] **Id.**

Respondent give either of the Petitioners express permission or invitation to send Respondent fax advertisements concerning Staples' products.[4]

On July 23, 2003, the Respondent filed suit against the Petitioners (the "Action") in the Superior Court of Richmond County, Georgia ("Superior Court"),[5] alleging that the transmission of the March 18, 2003 fax advertisement without the Respondent's express invitation or permission violated the TCPA. In the Action, the Respondent seeks to represent classes of individuals and businesses who received the Fax and other unsolicited faxes sent by either of the Petitioners advertising the commercial availability of goods or services sold or offered for sale by Staples.[6]

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[4] **Affidavit of Mattison R. Verdery dated November 6, 2003, attached as Exhibit "A" hereto. There is no dispute in the Action that Respondent did not give either Petitioner express invitation or permission to send Respondent fax advertisements.**

[5] **Mattison R. Verdery, C.P.A., P.C. v. Staples, Inc. and Quick Link Information Services, LLC, Superior Court of Richmond County, Civil Action No. 2003-RCCV-728.**

[6] **Amended Complaint, ¶ 21.**

The Petitioners answered the Respondent's complaint, denying any liability, and discovery ensued. The Respondents filed a comprehensive motion for summary judgment in which the Respondents presented a litany of arguments why the Action should not proceed, including the very same issue now raised in the Petition–that the Respondent's legal claim for damages under the TCPA is barred by a purported "established business relationship" defense.[7] Additionally, the Petitioners argued in the Action that the Superior Court lacked subject matter jurisdiction because, according to Petitioners, the Respondent "challenges the validity of Commission rules" in the Action[8] and that jurisdiction over such "challenges" lies exclusively in

the federal courts of appeal.

After extensive briefing by the parties and oral argument, the Petitioners' motion was denied by the Superior Court on March 24, 2004.[9] After considering all the defenses and supporting arguments raised by the Petitioners, the Superior Court exercised its subject matter jurisdiction over Respondent's TCPA claims and ruled, in accordance with Georgia law, that genuine issues of material fact remain in the Action precluding the entry of judgment as a matter of law.[10] That decision remains the subject of a pending motion for reconsideration in the Action filed by the Respondents.

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[7] **Brief of Defendants Staples, Inc. and Quick Link Information Services, LLC in Support of Motion for Summary Judgment, Petition, Ex 5, pp. 21-30.**

[8] **Petition, p. 1.**

[9] **Order entered March 24, 2004, Petition, Ex. 9.**

[10] **Id.**

On March 25, 2005, following a discovery dispute involving the Petitioners' steadfast refusal to provide any discovery concerning the class sought to be represented by Respondent, the Superior Court issued an order compelling the Petitioners to provide limited class discovery.[11]

[11] **Order entered March 25, 2004, Petition, Ex. 11.**

On April 21, 2004, the Petitioners filed with the Superior Court a motion captioned "[Respondents'] Application for Temporary Restraining Order and Interlocutory Injunction and Motion for Stay of Proceedings for Lack of Subject Matter Jurisdiction." Following a hearing on April 27, 2004, the Superior Court denied the motion, finding that the issue of the court's subject matter jurisdiction had been previously raised in the Petitioners' motion for summary judgment and decided by the court.[12]

On May 3, 2004, the Petitioners filed the Petition with the Commission, seeking declaratory rulings on defenses already presented to and ruled upon by the Superior Court and a cease and desist order barring further prosecution of the Action.

II. ARGUMENT AND CITATION OF AUTHORITY

Losing in the Superior Court, the Petitioners now ask the Commission to circumvent the Superior Court's clear jurisdiction under the TCPA and to effectively overrule the court's legal determinations. Not satisfied with this extraordinary tactic, the Petitioners also seek the unprecedented–a cease and desist order from the Commission barring further prosecution of the Respondent's Action in Superior Court. As the Respondent shows below, the Commission is without jurisdiction or authority to grant the requested relief and, therefore, should take no position and deny the Petition.

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[12] **Order dated April 29, 2004 (placed into the Commission's record of this proceeding by Petitioners on May 7, 2004). The Superior Court concluded that the Respondents' latest motion was either one for reconsideration of the court's earlier ruling or a motion to dismiss based on the same legal ground previously decided. Id.**

A. The Superior Court has exclusive jurisdiction over the Action and Respondent's claim against Petitioners.

The Respondent filed the Action pursuant to TCPA, which provides that "[i]t shall be unlawful for any person within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."[13] The TCPA unequivocally grants a private right of action for violations of the junk fax prohibition *exclusively* in state court:

> **A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring *in an appropriate court of that State*, (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or (C) both such actions.[14]**

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[13] **42 U.S.C. § 227(b)(1)(C). The Commission's regulations promulgated under the TCPA similarly provide that no person may "[u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 C.F.R. § 64.1200(a)(3).**

[14] **42 U.S.C. § 227(b)(3) (emphasis supplied).**

Georgia courts have specifically recognized the private right of action created by, and exclusive subject matter jurisdiction granted to state courts under, the TCPA.[15] Every federal circuit court that has spoken to this issue has reached the same conclusion– jurisdiction of private TCPA claims lies *solely* in the state courts.[16] In doing so, the courts have also unanimously rejected the contention that there is federal question jurisdiction over TCPA claims.[17] The law could not be more clear. The Respondent's claim against the Petitioners is properly before the Superior Court, and only the Superior Court has jurisdiction over the Action and the legal authority to resolve claims and defenses asserted therein.

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[15] **"[G]eorgia law does not expressly prohibit private TCPA actions for the transmission of unsolicited facsimile advertisements. The Georgia Public Utilities Code prohibits the transmission of unsolicited facsimile advertisements; private actions are neither explicitly authorized nor forbidden in the relevant Code section. In accordance with our conclusion in Division 1(a), the absence of a statute declining to exercise the jurisdiction authorized by the TCPA gives Georgia citizens the right to seek the relief provided by the TCPA." Hooters of Augusta, Inc. v. Nicholson, 245 Ga. App. 363, 365 (Ga. App. 2000) (citations omitted).**

[16] **International Science & Technology Institute, Inc. v. Inacom Communications, Inc., 106 F.3d 1146 (4th Cir. 1997); ErieNet, Inc., v. Velocity Net, Inc., 156 F.3d 513, 520 (3d Cir. 1998); Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd., 156 F.3d 432, 438 (2d Cir. 1998); Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287, 1289, *modified*, 140 F.3d 898 (11th Cir. 1998); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 514 (5th Cir. 1997); Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000).**

[17] **As the Eleventh Circuit noted in Nicholson:**

> **Like the Fourth and Fifth Circuits, we also reject Hooters' argument that federal-question jurisdiction exists 28 U.S.C. § 1331 (1994) . . . We recognize that as a general mater, a cause of action created by federal law will be properly brought in the district courts. Nevertheless, the general jurisdictional grant of section 1331 does not apply if a specific statute assigns jurisdiction elsewhere. Here, the text of the [Telephone Consumer Protection] Act . . . demonstrates that Congress intended to assign the private right of action to state courts exclusively. 136 F.3d at 1289 (internal citations and quotations omitted).**

Specific grants of jurisdiction, such as Congress' grant of exclusive jurisdiction to state courts for private TPCA actions, supercede general grants of jurisdiction found in other statutes.[18]

[18] **Nicholson, 136 F.3d at 1289 (general grant of jurisdiction does not apply if specific statute confers jurisdiction elsewhere); Carpenter v. Department of Transp., 13 F.3d 313, 316 (9th Cir. 1994) ("Specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts"); Ramey v. Bowsher, 9 F.3d 133 (D.C. Cir. 1993) ("a statute which vests jurisdiction in a particular court cuts off jurisdiction in other courts in all cases covered by the statute") (citation omitted); Owner-Operators Independent Drivers Ass'n v. Skinner, 931 F.2d 582 (9th Cir. 1991) (specific judicial review procedures for final agency decisions of Federal Highway Administration and Interstate Commerce Commission not affected by general judicial review provisions of Hobbs Act);** Connors v. Amax Coal Co., 858 F.2d 1226, 1231 (7th Cir. 1988) **("[G]enerally, when jurisdiction to review administrative determinations is vested in the courts of appeals these specific, exclusive jurisdiction provisions preempt district court jurisdiction over related issues under other statutes").**

This rule pertains even if Congress failed to expressly state that jurisdiction would be exclusive.[19] Here, there is no issue regarding whether Congress conferred any power upon the Commission to adjudicate the merits of private claims under the TCPA–clearly, it did not. To the extent the Commission's general regulatory power authorizes it to adjudicate certain disputes between private parties involving matters or issues otherwise within the Commission's purview, Congress superceded such general authority with respect to private claims under the TCPA by specifically vesting state courts with exclusive jurisdiction over the same.[20]

The very issues the Petitioners now raise before the Commission–the subject matter jurisdiction of the Superior Court and the existence and application of the "established business relationship" or EBR defense to the Action–have been raised and duly considered by the Superior Court. In civil actions, it is the province of courts, not agencies, to construe and apply the law and to adjudicate the merits of the parties' claims and defenses.[21] In doing so, courts vested with jurisdiction to adjudicate private claims consider agency pronouncements concerning the proper interpretation of a statute in question.[22] However, where a statute is clear *both* courts and agencies are bound to apply

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[19] **Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 422 (1965) ("That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion.")**

[20] **United Artists Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965, 980 (E.D. Az. 2000).**

[21] **("[T]he task of the federal courts is to interpret and apply statutory law, not to create common law."). Northwest Airlines v. Transp. Workers Union, 451 U.S. 77, 95 (1981).**

[22] **Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).**

it as written.[23]

[23] **"If the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron U.S.A., Inc., 467 U.S. at 842-43 (1984).**

In denying the Petitioners' motion for summary judgment, the Superior Court properly assumed subject matter jurisdiction over the Respondent's claim, weighed the Commission's comments regarding an "established business relationship" in light of the TCPA's clear requirement of "express invitation or permission," and held that issues of fact remain for jury determination.[24] Even if the Commission were to accept the

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[24] **It should be noted that despite two opportunities, Georgia appellate courts have refused to recognize a statutory established business relationship defense to TCPA junk fax claims. Hammond v. Carnett's, Inc., 2004 Ga. App. LEXIS 350 (Ga. App. 2004)** ("[our previous] holding in [Schneider v. Susquehanna Radio, **260 Ga. App. 296 (2003)] does not establish that the "established business relationship" exception applies to the [junk fax] claims at issue in this case"); McGarry v. Cingular Wireless, L.L.C., 2004 Ga. App. LEXIS 423, 10-11 (Ga. App. , 2004) ("[W]e need not reach the [EBR] issue in this case given our holding in division 1 that McGarry failed to establish that she was a member of the class she seeks to represent.") The only other state appellate court to review the issue, the Texas Court of Appeals, has found the notion of an EBR exception to junk fax liability to be in direct conflict with the plain language of the TCPA:** "The FCC has stated that 'facsimile transmission [sic] from persons or entities who have an established business relationship with the recipient can be deemed to

Petitioners' invitation to effectively overrule the Superior Court's decision, the Commission would nonetheless be bound to follow the plain meaning of the statute.[25]

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be invited or permitted by the recipient.' This notion of deeming permission is based on an inference and, as such, seems to conflict with the TCPA's requirement that the invitation or permission be express. *It is difficult to characterize permission granted by implication as "express."* Chair King v. GTE MobileNet of Houston, 2004 Tex. App. LEXIS 780, slip op. at 76 (citations omitted) (emphasis added.)

[25] **Chevron, supra.; Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) ("No deference is due to agency interpretations at odds with the plain language of the statute itself.")**

There is no legitimate basis for the Petitioners to attempt to initiate a parallel declaratory proceeding before the Commission regarding claims and defenses that will be fully adjudicated in the Superior Court and Georgia appellate courts vested with exclusive jurisdiction over the Respondent's TCPA claims. When federal questions arise in the course of state proceedings, it is "the province and duty of the state courts to decide them."[26] The Superior Court has and will continue to fulfill its judicial duties, even though the outcome may not be to the Petitioners' liking.

Petitioners' irrational and hyperbolic assertion that "the trial court has steadfastly refused not only to dismiss the case but also to grant avenues for appeal to the Georgia appellate courts"[27] is a misrepresentation of the Superior Court's actions and Georgia law. In accordance with state law, the Superior Court can dismiss the Action at any time a legal ground exists for doing so. In Georgia, like most jurisdictions, appeals are permitted from various decisions of a trial court, including a final disposition of the claims before it.[28] To date, the Superior Court has determined that no valid ground exists requiring dismissal of the Action and no order has been entered from which an appeal may be taken.

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[26] **Rooker v. Fidelity Trust Co., 263 U.S. 413, 414 (1923).**

[27] **Petition, pp. 2-3**.

[28] **O.C.G.A. §§ 5-6-33, 5-6-34, 5-6-35.**

The Petitioners also falsely represent that "[t]he effect of the trial court's inaction is to require that Petitioners suffer full-blown 'class discovery' and have a multi-billion-dollar judgment entered against them . . . before being entitled to further review."[29] Due to the efforts of the Petitioners thus far to avoid engaging in discovery, the Action is months, if not years, from reaching a trial date, let alone the entry of a judgment in any amount. The discovery ordered by the Superior Court is actually quite narrow in scope, and can be accomplished quickly and economically through a simple deposition and production of related documents.[30] The extraordinary lengths to which the Petitioners will go to prevent discovery of the most basic elements of Staples' fax advertising campaign defines their Petition before the Commission–as simply another litigation tactic in the battle to stop the Respondent from pursuing its TCPA claim in Superior Court.

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[29] **Petition, p. 3.**

[30] **Petition, Ex. 11. It should be noted that all of the discovery sought by the Respondent and ordered by the Superior Court relates to the characteristics of the class Respondent seeks to represent (e.g., the methodology used to compile Staples' fax database and the composition of different groups of fax recipients contained in the database). Thus, the precise discovery that Staples desperately wants to stop will in fact either confirm or refute the Petitioners' assertion that recipients of Staples fax advertisements are all "customers of Staples." Petition, p. 13.**

Based on principles of federalism, comity and judicial economy, federal courts generally abstain from asserting jurisdiction over claims pending in state court.[31] Given the TCPA's unique statutory scheme established by Congress, the same logic and rule should apply to the Petitioners' efforts to involve the Commission in Action pending in Superior Court. Even if the Commission had the legal authority, which the TCPA does not grant, to intervene in pending state court actions, the Commission can and should decline do so.[32] Petitioners cite no authority that confers upon the Commission either discretion or a statutory duty to interfere with state court proceedings where the court is vested with exclusive jurisdiction by federal law. In the absence of any law requiring or permitting the Commission to interfere with the Action, the Commission may, and should, abstain from doing so.

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[31] **Younger v. Harris, 401 U.S. 37, 43 (1971) ("Since the beginning of this country's history Congress has . . . manifested a desire to permit state courts to try state cases free from interference by federal courts.");** Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (principles of ***Younger*** abstention apply with equal force to ongoing state civil proceedings); Middlesex County Ethics Committee v. Garden State Bar Association**, 457 U.S. 423 (1982) (approving application of *Younger* abstention to cases involving state administrative proceedings); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (*Younger* abstention doctrine applied to prevent federal district court from enjoining plaintiff who had prevailed at trial in state court from executing judgment pending appeal of judgment to state appellate court.);** Outdoor Media Dimensions, Inc. v. Crunican, 1999 U.S. App. LEXIS 28434, 3-4 (9th Cir. 1999) (**"The *Younger* abstention doctrine reflects the strong federal policy against federal interference with pending state judicial proceedings. Abstention is required, and the court must dismiss the federal suit, when (i) the state proceedings are ongoing; (ii) the proceedings implicate important state interests; and (iii) the state proceedings provide an adequate opportunity to raise federal questions.") (internal quotations and citations omitted).**

[32] **"Given that Congress has allocated the interpretation *and application* of the TCPA to state courts to complement pre-existing state law causes of action, there is no strong reason why a federal court should interlope on a state adjudication of a [TCPA] claim." United Artists Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965, 980 (E.D. Az. 2000) (emphasis added).**

B. The declaratory relief sought by the Petitioners is inappropriate and unwarranted.

The Petitioners seek declarations from the Commission (i) regarding the proper jurisdiction for the Respondent's TCPA claims, (ii) addressing whether an "established business relationship" between the sender and recipient of a junk fax is a valid defense to a claim by the recipient under the TCPA, and (iii) finding that the Petitioners' transmission of the Fax to the Respondent of the Fax did not violate the TCPA.[33] In support of their request, the Petitioners rely upon Section 554(e) of the Administrative Procedures Act ("APA") and 47 C.F.R. § 1.2(e). In fact, neither the APA nor the Commission's rules permit declaratory relief under the present circumstances.

The APA provides as follows:

> **Sec. 554. - Adjudications. . . (e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order *to terminate a controversy or remove uncertainty*. 5 U.S.C. § 554(e)(emphasis supplied).**

Similarly, Section 1.2 of the Commission's procedural rules provides:

> **Section 1.2 Declaratory rulings. The Commission may, in accordance with 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling *terminating a controversy or removing uncertainty*. 47 C.F.R. § 1.2 (emphasis supplied).**

Under both the APA and the Commission's rules, declaratory relief is only

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[33] See **Petition, pp. 1-2.**

appropriate where the granting of such relief *will* terminate a controversy or remove uncertainty. Neither is possible here. The Superior Court has, by denying Petitioners' motion for summary judgment, determined that genuine issues of material fact must be decided by a jury, including the factual determination of whether, by virtue of its contacts with Staples, the Respondent gave the necessary consent required by the TCPA for the transmission of facsimile advertisements. No pronouncement or "ruling" by the Commission could change the fact that a jury in Richmond County, Georgia has been authorized by Congress to decide such issues and determine the ultimate liability, if any, of the Petitioners. Regardless of the Commission's ruling, the Action will proceed in the Superior Court to final adjudication.

Nor would any pronouncement by the Commission remove uncertainty. While the Petitioners apparently view the outcome of the Action as "uncertain," such uncertainty is the hallmark of litigation. But, the intent behind Section 554(e) of the APA and 47 C.F.R. § 1.2(e) clearly is not to permit a defendant in a civil case to remove the uncertainty and risk of litigation by circumventing a court's jurisdiction to resolve claims pending before it.

In light of these circumstances–that state court litigation between the Petitioners and Respondent will not terminate nor would a ruling of the Commission remove uncertainty about the outcome of the Action–neither of the two bases for granting declaratory relief under the APA and the Commission's rules are satisfied. Section 554(e) of the APA and 47 C.F.R. § 1.2(e) are inapplicable here, and Petitioners' reliance thereon is mistaken.

Moreover, the Superior Court would not be bound by a ruling of the Commission

concerning any aspect of the merits of Respondent's claim s or the Petitioners' defenses in the Action. Given the Superior Court's exclusive jurisdiction under the TCPA, any ruling by the Commission would be merely advisory in nature and have the same effect–no more and no less–as prior pronouncements or rulings of the Commission concerning the subject matter of the Action.[34] Nor would the opinion of the Commission constitute admissible evidence at trial or be of any assistance to the jury.[35]

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[34] **"Because it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction, the FCC's declaratory ruling amounts to an agency opinion..." Miller v. FCC, 66 F.3d 1140, 1144 (11th Cir. 1995).**

[35] **"Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman. . . .However,** ***a party may not bolster his case as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently of the opinion of others*****. Cromer v. Mulkey Enters., 254 Ga. App. 388, 392, 562. S.E.2d 783, 786 (Ga. App. 2002) (citations and internal quotes omitted).** Certainly, a jury can decide on its own the meaning of "prior express invitation or permission" and whether the Respondent give the necessary consent to receive Staples fax advertisements.

The Petitioners primarily seek advisory opinions regarding legal conclusions or issues of fact that must be decided by Superior Court.[36] But the construction and interpretation of law is the sole province of courts, not agencies.[37] Moreover, courts decline to give advisory opinions on the ground that they lack jurisdiction to rule absent a live case or controversy.[38] Here, there is no case or controversy pending *before the Commission*.

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[36] **The first two declarations sought by the Petitioners–that challenges to agency rules and regulations must be brought in the federal courts of appeals and that the EBR constituted a valid legal defense to junk fax liability as of March 18, are general conclusions of law to be decided by courts. See Northwest Airlines v. Transp. Workers Union, supra. The third declaration–that the Petitioners' transmission of the Fax to the Respondent did not violate the TCPA or the Commission's rule or regulations–is a mixed statement of law and fact requiring resolution by a jury in the Superior Court.**

[37] **Northwest Airlines, supra.**

[38] "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions." Preiser v. Newkirk, 422 U.S. 395, 401 (1975); ***see also*** **Flast v. Cohen, 392 U.S. 83, 95 (1968)("[N]o justiciable controversy is presented . . . when the parties are asking for an advisory opinion. . . ")** ***and*** **Miller, 66 F.3d at 1146 (prohibition on advisory opinions and case or justiciability "requirements apply with the same stringency in the administrative law**

Rather, there is an active case and controversy involving the same parties and issues currently pending in the Superior Court pursuant to a clear grant of jurisdiction by Congress. The Commission has no authority to issue an advisory opinion concerning the outcome of the Action, and should decline to do so.

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context.")

Courts generally have discretion to accept or decline jurisdiction of declaratory judgment actions.[39] This is especially true where the declaration sought would not resolve a dispute, but instead would amount to an advisory opinion as discussed above.[40] It has long been recognized that "reactive" declaratory judgment actions such as the instant one should generally be dismissed.[41] As stated by the Eleventh Circuit, "[u]nnecessary interference with state court litigation should be avoided. The Declaratory Judgment Act was not intended to enable a party to obtain a change of tribunal from a state to federal court."[42] The same principle applies with equal force here. The Petitioners should not be permitted to effectively remove the Respondent's private cause of action under the TCPA

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[39] **Wilton v. Seven Falls Co., 515 U.S. 277, 282, 132 L. Ed. 2d 214, 115 S. Ct. 2137 (1995) (federal courts have "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites").**

[40] **The probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised. *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), citing Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 12 (U.S. , 1987) (citations omitted).**

[41] **Brillhard v. Excess Ins. Co., 316 U.S. 491, 495 (1942) (". . . it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues . . . between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided."); Government Employees Inc. Co. v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998) ("...[i]f there are parallel state proceedings involving the same issues and parties at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court . . . [F]ederal courts should generally decline to entertain reactive declaratory actions.").**

[42] **Angora Enterprises, Inc. v. Condominium Assoc. of Lakeside Villlage, Inc., 796 F.2d 384, 388 (11th Cir. 1986) (citing 10A C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2758 at 630-32).**

from state court, its statutory home, to the Commission, which has no jurisdiction over the dispute, in search of a better result.

There is no compelling reason why the Commission should depart from the general rule followed by federal courts that a state court action filed first has priority. The declaratory proceeding file by the Petitioners is an unjustified and needless waste of the Commission's and the parties' resources. The Commission should see the Petition for what it is–strategic maneuvering by the Petitioners searching for a forum perceived to be more advantageous–and reject it.

C. The Commission has no authority to enjoin the Respondent from further prosecution of the Action in Superior Court.

In addition to declaratory relief, the Petition seeks a cease and desist order from the Commission enjoining the Respondent from prosecuting the Action in Superior Court. This request is an extraordinary and unprecedented attempt to prohibit a private party from pursuing a claim clearly authorized by federal law. Neither the Federal Communications Act, the APA nor the TCPA authorize such an act.

The Federal Communications Act ("Act") empowers the Commission to issue cease and desist orders under limited circumstances:

> **(b) Cease and desist orders. Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified**

by the United States, the Commission may order such person to cease and desist from such action.

47 U.S.C. § 312(b). None of the foregoing statutory requirements imposed by Congress are met in this case.

Petitioners make no argument that either of the first two provisions of § 312(b) applies. Is it undisputed that the Respondent does not hold any license granted by the Commission, and therefore could not be in violation of such a license. It is equally clear that the Respondent is not an operator, broadcaster or licensee engaging in any regulated activity covered by the Act. Rather, the Petitioners contend, without authority, that § 312(b)(3) applies because, according to Petitioners, the Respondent is in violation of the Act and Commission rules and regulations by purportedly launching a collateral attack against the latter in the Superior Court.[43] To call this argument a "stretch" would be quite forgiving.

[43] **"The Commission should find and declare that [the Respondent] has failed to follow [the procedural requirements for judicial review of agency decisions], and consequently has violated applicable law by collaterally attacking Commission decisions in state court." Petition, pp. 16-17.**

Exercising rights granted under the TCPA, the Respondent filed suit against the Petitioners in the Superior Court for declaratory and injunctive relief and damages.[44] The only relief sought in the Action is against the Petitioners; the Respondent seeks no affirmative relief relating to any rule or regulation of the Commission.[45] Moreover, none

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[44] **See Amended Complaint.**

[45] **Amended Complaint, pp. 11-12. It must be noted that the Commission's comments concerning the EBR in the 1992 and 1995 reports and orders do not rise to the level of a final agency *decision*, rule or regulation. "Before addressing the constitutional considerations affecting whether this court has jurisdiction over petitioners' challenge, *it is necessary to characterize appropriately the FCC action*. The Commission's declaratory ruling...does not define relevant statutory terms, dictate the use of certain industry practices, or prescribe appropriate methods for calculating the lowest unit charge...[It] is not an adjudication of a pending case involving a dispute between a candidate and a broadcast station licensee. It is not a decision, a letter of admonition, or an order levying a penalty of forfeiture, a loss of operating authority, or a refund to the candidate...[T]he FCC's declaratory ruling amounts to an agency opinion–a pronouncement interpreting the Communications Act. . ." Miller v. FCC, 66 F.3d 1140, 1144 (11th Cir. 1995) (emphasis added).**

of the defenses or issues raised by the Petitioners in the Action–including the issue of whether the EBR is a valid defense to junk fax liability under the TCPA–need or can be adjudicated anywhere else except in the Superior Court.[46] All of the defenses asserted by the Respondents in the Action must be considered by, and will be adjudicated in, the Superior Court.[47]

[46] ***See*** **International Science & Technology Institute, Inc. v. Inacom Communications, Inc., supra.; ErieNet, Inc. v. Velocity Net, Inc., supra.; Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd., supra.; Nicholson v. Hooters of Augusta, Inc.,** supra.; Chair King, Inc. v. Houston Cellular Corp., **supra.; Murphey v. Lanier, supra**.

[47] ***See*** **Rooker v. Fidelity Trust Co., supra.**

It would be irrational and untenable if the Respondent, by pursuing his remedies under the TCPA, were to be found simultaneously in compliance with the TCPA but conversely in violation of the Act or Commission rules or regulations. Such a result would be directly contrary to the TCPA's goal of providing consumers and small businesses such as the Respondent with private rights of action in state court, and simply could not have been intended by Congress. Further, to the extent the Commissions's rules or regulations are in conflict with the TCPA, the latter must control.[48] Thus, if the Commission's rules and regulations do not harmonize with the statute, it is the statute itself that must be followed.

The TCPA's exclusive grant of authority to state courts over private causes of action is unequivocal. Nowhere did Congress express or imply the desire that the Commission be vested with *any* authority over civil claims brought under the statute.[49]

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[48] "We agree that an administrative agency's regulation that conflicts with the parent statute is ineffective." La Vallee Northside Civic Assoc. v. Virgin Islands Coastal Zone Management Com., 866 F.2d 616, 623 (3rd Cir. 1989), citing U.S. v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982). It must be noted, however, the Commissions' comments concerning the EBR and junk faxing found in the 1992 and 1995 reports and orders concerning the TCPA do not rise to the level of

[49] ***See* 47 U.S.C. § 227(b)(1).**

Thus, the Commission is prohibited from acting to divest the Superior Court of jurisdiction regarding issues lawfully before that court.[50]

[50] **Miller v. FCC, supra. *See also* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.")**

Further, even if the Commission had authority to enjoin the Action, doing so would be tantamount to establishing a new rule that no TCPA private action may proceed in state court without immediate review by the Commission, if requested by a party. Nothing in the TCPA, the Congressional history, or any authority cited by Petitioners supports such a fundamentally unsound and unsupported outcome.[51] Granting the Petitioners' request for an injunction would render meaningless the private right of action granted by Congress as a means of redress and additional enforcement of consumer protections granted by the TCPA. The law does not permit such a statutory excision by any court or agency.[52]

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[51] **In addition to raising a host of profound issues involving the constitutional rights of litigants, comity among state and federal institutions, separation of powers and judicial and administrative economy, such a result would impermissibly change the statutory rights and procedural scheme Congress created in the TCPA.**

[52] **"A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." United States v. Smith, 499 U.S. 160, 183 (1991) (internal citations and quotes omitted). *See also* Chevron U.S.A., Inc., supra.**

III. CONCLUSION

For the above and forgoing reasons, the Respondent respectfully asks that the Commission take no position on any aspect of the Petition and deny all relief requested by the Petitioners.

This 10th day of April, 2004.

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CERTIFICATE OF SERVICE

I, Jay D. Brownstein, hereby certify that on this 10th day of May, 2004, a true and correct copy of the foregoing (with exhibits) was sent via email or first class United States mail (as indicated below) to the following:

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